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No. 06-1299

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In The
Supreme Court of the United States

LAURA BAXTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR REHEARING FROM DENIAL OF PETITION FOR A WRIT OF CERTIORARI

ALLAN A. ACKERMAN
Counsel of Record
2000 N. Clifton Avenue
Chicago, Illinois 60614
Telephone: 312-332-2891
Facsimile: 773-871-3304

STEPHEN M. KOMIE
KOMIE AND ASSOCIATES
1 N. LaSalle Street
Chicago, Illinois 60602
Telephone: 312-263-2800

Attorneys for Petitioner Laura Baxter

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

PETITION FOR REHEARING FROM DENIAL OF PETITION FOR A WRIT OF CERTIORARI

Laura Baxter (hereafter petitioner) respectfully moves this Court for an order (1) vacating the denial of her petition for writ of certiorari entered on May 21, 2007, and (2) granting the petition. In the alternative, petitioner respectfully moves the Court for an order (1) vacating the denial of her cert petition entered on May 21, 2007 and (2) granting the petition and remanding petitioner's case to the Seventh Circuit for proceedings consistent with the Court's pending opinion(s) in *Claiborne v. United States,* No. 06-5618, *cert. granted*, 127 S.Ct. 551 (2006) and *Rita v. United States*, No. 06-5754, *cert. granted*, 127 S.Ct. 551 (2006). The Court heard oral arguments in *Claiborne* and *Rita* on February 20, 2007. Petitioner suggests that this Court's decision in *DeMaree v. United States,* No. 06-8377 will directly impact this petition for rehearing (reasons, *infra*).

REASONS IN SUPPORT OF REHEARING

1. Petitioner's sentencing, in the district court and on direct appeal to the Seventh Circuit, was governed by [the] "presumption of reasonableness" which the Seventh Circuit engrafted into federal sentencing appeals (post-*Booker*) starting with *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005) ("The best way to express the new balance, in our view, is to acknowledge that any sentence that is properly calculated under the Guidelines is entitled to a rebuttable *presumption of reasonableness.*") (ital. emph. added). The Seventh Circuit has perpetuated its reasonableness presumptions to current sentencing litigation, *cf. United States v. Duncan*, 479 F.3d 924, 930 (7th Cir. 2007) ("A sentence within a properly-calculated Guidelines range is entitled to a presumption of reasonableness.") (citing *Mykytiuk*, *ante*).

2. On April 20, 2007, the Solicitor General, acknowledging the potential impact of *Claiborne* and *Rita,* filed its

memorandum position in petitioner's case. The Solicitor General, citing *Claiborne* and *Rita* (and *Booker*) wrote:

> Because the proper disposition of the petition for a writ of certiorari may be affected by the Court's resolution of *Claiborne* and *Rita*, the petition should be held pending the decisions in those cases, and then disposed of as appropriate in light of those decisions.

Solicitor General Mem. at p. 1. Petitioner embraces the government's position which urged that the case be held pending *Claiborne* and *Rita*.

In her cert petition, she also contended that review should be granted because the government's brief in the United States Court of Appeals for the Seventh Circuit urged affirmation based on *United States v. DeMaree*, 459 F.3d 791, 794-95 (7th Cir. 2006) (Posner, J.) (pp. 21-22 of government's Seventh Circuit brief). In substance, *DeMaree* held that the district court was required to apply Guidelines in effect at the time of sentencing, as opposed to Guidelines in effect at the time of the offense (meaning that petitioner should have been exposed to a higher Guideline sentencing range).

DeMaree's cert petition, No. 06-8377, remains pending – the government's brief in opposition was filed on March 12, 2007, and *DeMaree* filed her reply on April 9, 2007. Hence, the Court's disposition of *DeMaree's* cert petition directly impacts petitioner's case.[1]

3. Petitioner's cert petition reproduced a statement by the district court in advance of sentencing:

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[1] Petitioner raised her *DeMaree* issue at pp. 15-18 of her cert petition. The government filed its memorandum in petitioner's case on April 20, 2007, waiving a *DeMaree* response unless otherwise directed by the Court. However, it filed its *DeMaree* brief in opposition in No. 06-8377 on March 12, 2007. The government eschewed referring to its *DeMaree* brief in opposition while responding to petitioner's cert petition.

> The Court: There are certain factors, of course, *that the sentencing guidelines require me not to consider.*

Transcript of 5/24/06 at Tr. 27; petitioner's cert petition at App. 29. Petitioner had urged a suspended custodial sentence in light of her multiple "good deeds" in accordance with U.S.S.G. § 5H1.11 and 18 U.S.C. § 3553(a). From all that appears, the district court may have felt it was prohibited from giving petitioner plenary consideration for her many "good deeds," while determining the need to impose a custodial sentence.

On direct appeal, the Seventh Circuit declined remand which would have provided the district court with an opportunity to explain what it meant – factors prohibited from sentencing consideration.

The Seventh Circuit heard oral argument in petitioner's appeal on February 27, 2007. During argument, the government urged affirmation contending, *inter alia,* that in light of *United States v. DeMaree, ante*, the district court erred in imposing sentence pursuant to the advisory guidelines in effect at the time of offense, rather than at the time of sentencing in accordance with 18 U.S.C. § 3553(a)(4)(A)(ii). Thus, according to the government, on sentencing remand, petitioner would be exposed to a longer guidelines sentence, and the appellate panel orally expressed its concern regarding the potential for a longer sentence on remand (embracing *DeMaree*) – which clearly contributed to appellate affirmation.[2]

4. During petitioner's May 24, 2006 dispositional hearing the district court commenced sentencing by referring to the advisory U.S.S.G. sentencing range (24-30

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[2] In light of *Claiborne, Rita* and *DeMaree*, the district court has permitted petitioner to remain enlarged on a personal recognizance bond pending certiorari and this petition for rehearing. Moreover, Chief Judge Holderman, the presiding Judge in petitioner's case, recently rejected the holding in *DeMaree*, see *United States v. Monti,* 477 F.Supp.2d 943 (N.D. Ill. 2007) (Holderman, Ch. J.).

months) based on a tax loss of approximately $500,000. The facts below disclosed that petitioner had been a Certified Public Accountant, and had received client referrals from sophisticated tax shelter promoters (all since indicted and awaiting trial in the U.S. District Court in Chicago). She pled guilty to a single count information based on her tax preparations for a single taxpayer. During the late 1990s, those tax returns were the subject of an IRS audit. Petitioner pled guilty to obstructing that audit. Ironically, post-audit, and pre-criminal charges, petitioner completed amended tax returns and the tax shelter-taxpayer remitted every cent the government claimed was owed by virtue of his tax shelter participation. The government's tax loss calculations were predicated on the IRS audit and the taxpayer made full restitution to the IRS (again, years before petitioner was charged).

More to the point, in *United States v. Kosinski*, 480 F.3d 769 (6th Cir. 2007), the court considered whether the sentencing court must consider the "tax loss" in determining a proper sentence in connection with 18 U.S.C. § 3553(a). While vacating and remanding, the Sixth Circuit explained that the district court *was not required to calculate or consider the tax loss in advance of imposing sentence* (ital. emph. added). The reversing Sixth Circuit panel explained:

> At resentencing, the district court should recognize and exercise its discretion to consider – or to not consider – Defendant's tax loss.

480 F.3d at 777 (concurring opinion noted).

Petitioner's point is straightforward: within the realm of tax-loss sentencing, the Sixth Circuit has taken the position that the district court has discretion to consider *vel non* the tax-loss within the contours of 18 U.S.C. § 3553(a). Clearly, the position taken by the Sixth Circuit conflicts with the position taken by the Seventh Circuit in petitioner's case.

CONCLUSION

Petitioner lacks the prevision to predict the Court's opinion(s) in *Claiborne*, *Rita* and *DeMaree*. However, [a] GVR order would permit petitioner to advance the holdings in *Claiborne, Rita* and *DeMaree* to the Seventh Circuit and, hopefully, thereafter to the sentencing court. Petitioner appreciates that [a] GVR order does not constitute a final determination on the merits, nor does it carry precedential weight. See *Tyler v. Cain*, 533 U.S. 656, 666 n. 6, 121 S.Ct. 2478 (2001); *Henry v. City of Rock Hill,* 376 U.S. 776, 777, 84 S.Ct. 1042 (1964).

For the foregoing reasons, as well as those contained in the petition for writ of certiorari, and the Solicitor General's memorandum response, this petition for rehearing should be granted, the petitioner's writ of certiorari should be granted, and petitioner respectfully requests this Honorable Court issue the writ of certiorari to the United States Court of Appeals for the Seventh Circuit. Alternatively, petitioner respectfully requests that this petition for rehearing be granted, the petition for writ of certiorari be granted, and the Court remand this matter for further proceedings in light of the expected opinion(s) from the Court in *Claiborne v. United States,* No. 06-5618; *Rita v. United States,* No. 06-5754, and *DeMaree v. United States,* No. 06-8377.

Respectfully submitted,

ALLAN A. ACKERMAN
Counsel of Record
2000 N. Clifton Avenue
Chicago, Illinois 60614
(312) 332-2891

Attorney for Petitioner
Laura Baxter

STEPHEN M. KOMIE
KOMIE AND ASSOCIATES
1 N. LaSalle Street
Chicago, Illinois 60602
312-263-2800

CERTIFICATE OF COUNSEL

I hereby certify that this Petition for Rehearing is submitted in good faith and not for delay. This Petiton for Rehearing is restricterd to the grounds set out in Rule 44.2.

Allan A. Ackerman